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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

Nos. 375 and 376

Nettie Meyer, Anna Jacobson, Jacob Meyerhoff, Joseph Meyerhoff, Julius Meyerhoff, John C. Pankin and Rae Mann,

appellants,

vs.

Kenmore-Granville Hotel Company, the debtor corporation; J. Gold, R. Sandroff and S. Isenberg, petitioning creditors; George W. Rossetter, Jay C. McCord and Sidney H. Kahn, members of the Sovereign and Sovereign Annex first mortgage bondholders committees,

appellees.

On writ of certiorari to the circuit court of appeals for the seventh circuit.

BRIEF FOR APPELLEES.

IRVING H. FLAMM, for petitioning creditors;
MAX FREDERICK GOLDBERG, for debtor corporation;
CLAUDE A. ROTH, BERNARD NATH, ARTHUR M. COX, for bondholders committees;
all of Chicago, Illinois,
attorneys for appellees.

ISAAC E. FERGUSON,
CLAUDE A. ROTH,
HARRY E. SMOOT,
all of Chicago, Illinois,
of counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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appellees.

BRIEF FOR APPELLEES.

Statement of the case.

Grant of certiorari:

October 14, 1935, certiorari was granted in nos. 375 and 376, under a single order. The only specification in the order granting the certiorari is the following: "Assigned for argument immediately following no. 157."*

A single petition for certiorari was filed in nos. 375 and 376. The petitioners have elected to let this petition stand as their brief on the appeals.

Case, no. 375:

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* *St. Louis Can Co.* v. *General American Life Insurance Co.* (C. C. A. 8), 77 F. (2d) 598; certiorari granted same day.

Case no. 375 relates to case no. 5491 of the circuit court of appeals (7th circuit), wherein the latter court dismissed the appeal taken by Nettie Meyer without prior leave of said court. (R. 104-105.)

Case no. 376 relates to case no. 5531 of the circuit court of appeals. In this case the latter court entered two orders: (1) dismissing appeal taken by Nettie Meyer on leave of the district court (R. 182); (2) denying petition of Nettie Meyer for leave to appeal (R. 177-178; memorandum opinion, pp. 16-18 of respondents' brief in opposition to petition for certiorari.)

PROCEEDINGS IN DISTRICT COURT LEADING UP TO CASE NO. 5491 OF CIRCUIT COURT OF APPEALS, CASE NO. 375 OF THIS COURT.

District court order of February 13, 1935:

February 4, 1935, an involuntary petition was filed in the district court for reorganization of Kenmore-Granville Hotel Company, an Illinois corporation, under section 77 B of the bankruptcy act.. (R. 2-33.) On February 13 the corporation filed an answer admitting the essential allegations of the petition and joining in the request for reorganization under section 77 B. (R. 34-35.) Thereupon, on the same day, the district court found that the petition for reorganization was filed in good faith and ordered: (1) that the creditors' petition stand approved as properly filed under section 77 B; (2) that the creditors of the debtor corporation be enjoined, until the further order of the court, from commencing or prosecuting any action against the debtor for the purpose of enforcing any lien or claim against its property, or interfering with the operation of its property; (3) that the receiver then in possession of the debtor's property, namely, Thomas D. Nash, county treasurer of Cook County (appointed receiver by the cir-

cuit court of Cook County), continue in possession until the further order of the court; (4) that a further hearing be held March 13 to determine whether a trustee should be appointed, or whether possession of the property should be restored to the debtor; (5) that George W. Rossetter, Jay C. McCord and Sidney H. Kahn, as members of the two bondholders committees concerned with the two first mortgage bond issues secured by separate parts of debtor's property, be permitted to file an intervening petition; (6) that notice be given by mail and publication to all creditors and stockholders of the further hearing provided by the order. (R. 36-37.)

Intervention of Nettie Meyer:

February 8, 1935—four days after the filing of the creditors' petition and five days before the entry of the order approving the petition—Nettie Meyer, as an alleged bondholder, filed an action for accounting in the superior court of Cook County, Illinois, against the debtor corporation and others, charging fraud by S. W. Straus & Co. in the original public sale of the two bond issues secured by debtor's property, also fraud in connection with the foreclosure of the two mortgages, also a fraudulent scheme to bring about a reorganization to the detriment of the bondholders and advantage of the defendants. (R. 38-62; 160 (par. 4).)

February 25, 1935, Nettie Meyer filed a petition in the 77 B proceeding; set forth in full the complaint filed a few days before in the state court; alleged that the federal court was without jurisdiction to interfere with the prosecution of her suit in the state court; alleged further that the petition for reorganization was not filed in good faith; then prayed: (a) that the reorganization proceedings be dismissed for want of jurisdiction, (b) that the proceedings be dismissed for want of good faith, (c) that the injunction be dissolved. (R. 37-65.)

Motions to strike and dismiss the petition of Nettie Meyer were filed by the petitioning creditors, by the debtor corporation, by the members of the bondholders committees. (R. 83-85, 85-87, 88-90.)

Upon consideration of said petition of Nettie Meyer and the several motions to strike and dismiss said petition, the trial judge announced (R. 90-93) that while he had no intention of destroying any cause of action the bondholders might have against S. W. Straus & Co., or against the mortgage trustees, or against the bondholders committee, he proposed to go ahead with the reorganization and to turn the debtor's property out of court as speedily as possible. The court said:

> "The bondholders have a right to get this out of court and to get it out speedily. I cannot see any reason why you should not go ahead. If you have a cause of action existing in this bondholder, or any bondholder, one of them or all of them, that is no part of the property of the debtor. I am not going to reorganize that cause of action, but, if there is a cause of action against anybody—I don't see it now, I haven't seen it—in the debtor, I am going to preserve that cause of action and pass it over to the reorganized corporation. In any event we are not going to throw it away." (R. 92.)

District court order of March 20, 1935:

Accordingly, on March 20, 1935, the court entered an order denying the prayers of the petition of Nettie Meyer to dissolve the injunction and to dismiss the proceedings for lack of jurisdiction and for bad faith. (R. 93.)*

From this order Nettie Meyer prayed an appeal in the district court. (R. 94-95.) The district court allowed the appeal upon the filing of an appeal bond in the sum of $500, the appeal not to operate as a stay of the proceedings. (R. 96.)

* The court did not dismiss the petition of Nettie Meyer, but reserved the motions to dismiss said petition until the presentation of the plan of reorganization and meanwhile required all parties to serve notice of further proceedings on her counsel. (R. 93.)

The appellees named in the citation on said appeal filed a joint motion in the circuit court of appeals to dismiss the appeal as one that could properly be taken only by leave of the appellate court, and on May 28, 1935, this motion was sustained and the appeal dismissed. (R. 103-105.)—

PROCEEDINGS IN DISTRICT COURT LEADING UP TO CASE NO. 5531 OF CIRCUIT COURT OF APPEALS, CASE NO. 376 OF THIS COURT.

Meanwhile the district court proceeded with the hearing on the plan of reorganization. In this phase of the case, however, Nettie Meyer chose not to participate. But the same firm of attorneys who represented her, Shulman, Shulman & Abrams, also represented six other holders of bonds (or certificates of deposit for bonds) who appeared in the case for the first time on April 20, 1935, when they filed with the special master: (a) proofs of claims, aggregating $8,000;* (b) objections to certain claims; (c) objections to the plan of reorganization as submitted to the court in the intervening petition filed by the members of the bondholders committees on February 27, 1935. (R. 138-140; 141-143.) Subsequently, on April 27, 1935, the same objectors filed in the clerk's office a proposed "amendment" to the plan of reorganization. (R. 144-145.)

Financial status of debtor corporation:

The debtor, in 1932, acquired ownership (subject to encumbrances) of the property known as the Sovereign Hotel, consisting of two buildings designed to be operated as a unit. The original owner, Albert Hotel & Building Corporation, on November 1, 1919, issued $1,000,000 6% first mortgage bonds, secured by trust deed and chattel mort-

* The record contains no proof of the interest of Nettie Meyer in these proceedings. However, with the consent of her counsel, we note that she is the holder of certificate of deposit no. B357 for bond no. 385 of the "Sovereign Annex" issue, in the amount of $1,000.

gage covering the "Sovereign;" and on August 1, 1922, the Sovereign Hotel Corporation issued $1,000,000 6½% first mortgage bonds, secured by trust deed and chattel mortgage covering the "Sovereign Annex." Both mortgages fell into default in 1931, whereupon two bondholders committees were organized, foreclosure suits were instituted in the circuit court of Cook county, decrees of foreclosure obtained. (R. 116.)

At the time of default there remained outstanding and unsubordinated, of the "Sovereign" bond issue, bonds in the principal amount of $575,000; of the "Sovereign Annex" bond issue, bonds in the principal amount of $798,000.

However, some time prior to the 1931 defaults, maturities of principal and interest under the two first mortgages had been met in part with the aid of advances made by S. W. Straus & Co., the house of issue, to the extent of $322,441.25. (R. 125, 160.) Additional cash advances, to meet other obligations of the hotel, were made by Nomis-Suarts Corporation, a Delaware corporation, affiliated with S. W. Straus & Co., to the extent of $73,371.45. (R. 125, 160.)*

Upon liquidation of S. W. Straus & Co., in a federal equity receivership proceeding, its claim for said advances was acquired, through purchase at the receiver's sale, by S. W. Assets Liquidation Corporation, organized for this purpose by approximately 96% of the creditors of S. W. Straus & Co. (R. 159.) While Nomis-Suarts Corporation still retained its claim for cash advances, it appeared that said corporation was heavily indebted and that any recovery on its claim would go to its creditors and not to persons connected with S. W. Straus & Co. (R. 159.)

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* Claims for these advances were approved and allowed as follows: (1) class B claim for subordinated "Sovereign" bonds and coupons, $202,308.22, with interest at legal rate from December 11, 1931; (2) class B claim for subordinated "Sovereign Annex" bonds and coupons, $173,574.34, with interest at legal rate from December 28, 1931; (3) class C claim for cash advanced by Nomis-Suarts Corporation, $73,371.45. (R. 148.)

The foregoing indebtedness was assumed by the debtor corporation. (R. 123, 160.) In addition, the property of the debtor was also subject to approximately $129,669.70 unpaid general property taxes. (R. 111.)

In connection with the cash advances made by S. W. Straus & Co., the equity interest in the property was acquired by said corporation and title vested in Kenmore-Granville Hotel Company. (R. 21-22, 125.) Possession of the property was surrendered to the first mortgage trustees and the income applied for the benefit of first mortgage bondholders. (R. 22.) On or about August 14, 1934, Thomas D. Nash, county treasurer of Cook County, Illinois, was appointed tax receiver of the property by the circuit court of Cook County, Illinois, whereupon the mortgage trustees yielded possession to said receiver. (R. 5, 123.)

The drastic effect of the depression on the earnings of the hotel appears from the operating statements for the years 1931, 1932 and 1933. (R. 33, 75.)*

Plan of reorganization:

February 27, 1935, the bondholders committees filed an intervening petition setting forth a proposed plan of reorganization, *viz.*: the plan of reorganization agreed upon February 26, 1935, by (a) the two bondholders committees (of identical personnel), (b) the debtor corporation, (c) S. W. Assets Liquidation Corporation. (R. 115, 130.) This agreement reaffirmed, with certain minor amendments, the plan of reorganization originally adopted by the bondholders committees February 3, 1933,** and submitted

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	1931	1932	1933
* Gross income	$267,407.79	$206,782.58	$156,803.55
Operating profit	79,436.96	24,788.63	30,737.73

Average occupancy shrank to the low point of 65.82% for the month of January 1934 (71.53% for the year 1933). (R. 73.)

** Rufus C. Dawes, Jay C. McCord, George W. Rossetter and Sidney H. Kahn were the members of the "Sovereign" bondholders committee when the plan of reorganization was originally adopted February 3, 1933. They were then also members of the "Sovereign Annex" bondholders committee, together with Robert E. Straus. (R. 115-116.)

to bondholders July 13, 1933, when it was accepted by the holders of approximately 94% of the unsubordinated and outstanding "Sovereign" first mortgage bonds, and 95% of the unsubordinated and outstanding "Sovereign Annex" first mortgage bonds. (R. 123.)

In 1933 it was contemplated that the plan of reorganization would be consummated through the foreclosure proceedings pending in the state court, but lack of cash funds stood in the way.

The amended plan of reorganization, as submitted by the bondholders committees February 7, 1935, is briefly summarized as follows (R. 122-130):

(1) Title to the hotel property to be vested in a new corporation, to be organized under the laws of Illinois.

(2) All authorized capital stock of the new corporation (common stock, with or without par value, as determined by counsel for committees) to be issued to three trustees to be selected by the committees.

(3) Certificates representing 90% of the capital stock to be issued to depositors of first mortgage bonds: 1¼ shares per $100 face amount "Sovereign" bonds and 1 share per $100 face amount "Sovereign Annex" bonds.

(4) Certificates representing 7½% of the capital stock to be issued to S. W. Assets Liquidation Corporation, in consideration of its claims on subordinated bonds and coupons.

(5) Certificates representing 2½% of the capital stock to be issued to Nomis-Suarts Corporation, in consideration of its claim for $73,371.45, also for causing title to the property to be conveyed to the new corporation.*

(6) Stock trust not to go into effect if opposed, upon referendum vote, by holders of 51% or more of amount of

* Nomis-Suarts Corporation then held all the stock of the owner corporation. (R. 125.)

the first mortgage bonds; otherwise to endure for a term of 10 years, subject to termination by holders of a majority in amount of the certificates at a meeting, or through referendum to be held at the end of each 2-year period, or at any time by a majority of the trustees.

(7) No sale or conveyance of the property to be voted by the trustees without submission to the certificate holders, nor then if holders of 33⅓% dissent.

(8) Certificate holders to have right to examine corporate records and books of account at any reasonable business hour; or to withdraw stock at any time upon surrender of certificates and payment of reasonable transfer fee and stamp tax.

(9) Aggregate compensation of three stock trustees not to exceed 1% of annual gross income derived from rental of rooms.

(10) No salaries to officers or directors of corporation while stock trust remains in effect.

District court order of February 27, 1935:

An order was entered by the district court February 27, 1935, permitting the intervening petition of the bondholders committees to be filed instanter; classifying creditors, providing for proof of claims, setting the case for hearing on the proposed plan of reorganization April 9, 1935, acceptances and objections to be filed meanwhile; providing for notice of said hearing by mail and publication. (R. 131-136.)

The time in which to file claims and objections to the plan of reorganization was afterwards extended to April 20, 1935 (R. 137), and, as already indicated, on April 20 certain objections to the proposed plan of reorganization were filed jointly by Anna Jacobson, Jacob Meyerhoff, John G. Pankin, Rae Mann, Joseph Meyerhoff and Julius Meyerhoff, the appellants herein (together with Nettie

Meyer). (R. 141-143.) The objections were: (1) that all further proceedings in the case should stop pending the disposition of the appeal taken by Nettie Meyer from the order entered March 20, 1935, which appeal was then pending in the circuit court of appeals (as case no. 5491); (2) that the plan of reorganization was inequitable because the bondholders were to receive stock in a corporation to be controlled by "the persons who have caused to sell the bonds to the public and have concealed material facts from them to their detriment," and because said persons were to receive 10% of the stock on a parity with the other bond owners; (3) that the members of the bondholders' committees should not be entrusted with promulgation of plans for future reorganization, or allowed to be the representatives of objectors who had deposited their bonds. (R. 142.)

Amendments of plan by court:

Upon consideration of the proposed plan and objections, the court on its own motion directed certain changes, among them the following (R. 161-165):

(1) Two of the three stock trustees to be designated by the court.

(2) Agent and depositary of trustees to be selected by court; compensation, not to exceed the usual amount, to be set in advance.

(3) Trustees each to receive as compensation ½ of 1% of annual gross income derived from room rentals, or $300, whichever shall be less.

(4) No new mortgage to be placed on property, for any purpose other than to pay taxes, except by court order.

(5) All allowances for services in connection with the reorganization to be fixed by the court.

(6) Expenses of reorganization and foreclosure not paid in cash to be evidenced by certificates of the new corpora-

tion bearing 5% interest, but the certificates not to be reducible to judgment.

With respect to the "amendment" to the plan of reorganization proposed by Anna Jacobson, *et al.*, (R. 144-145), the court commented as follows:

> "The amendment to the plan proposed by Anna Jacobson contemplates too complicated a plan of reorganization. Plans of reorganization should, especially in these real estate matters, be as simple as possible. Furthermore, it seems to the court that it is better, at the present time, to determine the relative rights, interests and preferences of all the parties in the property, so that when it comes time to sell the property there will not be a controversy, as there certainly would be a controversy if it were proposed to sell the property for enough to pay off class A certificates and nothing was to be left for class B or class C certificates. As the court has indicated, the time to settle that controversy is at the present moment.
>
> The proposed amendment of Anna Jacobson to the plan seems to be the preservation of a supposed cause of action against somebody, rather than the reorganization of this property and getting it out of court. The court has heretofore, in an oral opinion which was reduced to writing and filed herein on March 20, 1935, adequately expressed its views concerning said cause of action. The plan of reorganization as amended shall be amended expressly to provide that if there is any cause of action, or if there are any causes of action, in the debtor or in any person, firm or corporation for the debtor, such causes of action shall be preserved and passed to the reorganized corporation." (R. 164-165.)

Order of May 20, 1935, approving plan of reorganization:

May 20, 1935, the court entered an order confirming the plan of reorganization, amended in conformity with the court's directions. (R. 145-158.)*

Because of appellants' claim that this order is appealable under section 25a of the bankruptcy act, in the same

* This is the order involved in case no. 5531 of the circuit court of appeals, case no. 376 of this court.

manner as an order confirming a composition in bankruptcy, attention is directed to the essential features of this order, as follows:

(a) Recital that cause comes on to be heard on motion to confirm the proposed plan of reorganization, also upon objections to said plan and to certain claims of creditors, also on motion for a further order authorizing and directing the debtor and bondholders committee to carry the plan of reorganization into effect. (R. 145-146.)

(b) Findings: that due notice of this hearing has been given; that the special master has filed his report of claims and objections; that the members of the "Sovereign" first mortgage bondholders committee have filed a claim on $543,600 unsubordinated bonds (and that individual holders of certificates have also filed claims on $12,800 of the same bonds); that the members of the "Sovereign Annex" bondholders committee have filed a claim on $764,100 unsubordinated bonds (and that claims have been filed by individual holders of certificates of deposit for same bonds in amount of $19,200); that a claim has been filed on behalf of the holders of "Sovereign" subordinated bonds and coupons in the total sum of $202,308.22, with interest at the legal rate from December 11, 1931; that a claim has been filed on behalf of the holders of "Sovereign Annex" subordinated bonds and coupons in the sum of $173,574.34, with interest at the legal rate from December 28, 1931; that a claim has been filed by Nomis-Suarts Corporation in the amount of $73,371.45. (R. 147-148.)

(c) Findings: that "Sovereign" bondholders committee and "Sovereign Annex" bondholders committee, as holders respectively of $543,600 and $764,100 principal face amount of bonds, have filed their acceptance of the plan of reorganization as amended (*viz.*, 94.54% and 95.75%, respectively, of the outstanding unsubordinated first mort-

gage bonds); that acceptance of the plan has been filed by the holders of all the capital stock of the debtor; likewise by the owners of all class B and class C claims (*viz.*, claims on subordinated bonds and coupons and claim of Nomis Suarts Corporation). (R. 148-149.)

(d) Findings: that Anna Jacobson, Jacob Meyerhoff, John G. Pankin, Rae Mann, Joseph Meyerhoff and Julius Meyerhoff have filed a document setting forth objections to certain claims, also objections to the plan of reorganization; that objections to the same claims and objections to the plan of reorganization have also been filed by William H. Melvin; that no other objections have been filed to claims or to the plan of reorganization. (R. 149.)

The court thereupon orders, adjudges and decrees, as follows:

(1) That this proceeding was instituted in good faith and was properly brought under section 77B of the bankruptcy act, the debtor being unable to meet its obligations as they matured. (R. 149.)

(2) That debtor is not one of the class of corporations excluded from the operations of section 77B. (R. 149.)

(3) That the report of the special master on filing and classification of claims is approved. (R. 150.)

(4)-(8) Objections to claims overruled. (R. 150-151.)

(9)-(10) Objections to claims of mortgage trustees for trustees' and attorneys' fees reserved for later heating. (R. 151-152.)

(11) That plan of reorganization as amended has been accepted by creditors holding more than two-thirds in amount of each class whose claims have been allowed and would be affected by the plan and on behalf of stockholders of the debtor holding more than a majority of shares of each class, as required by the provisions of section 77B. (R. 152.)

(12) That said bondholders committees had authority to act in these proceedings and to accept the plan of reorganization on behalf of the persons who deposited bonds with said committees. (R. 152.)

(13) That all amounts to be paid for expenses and services incident to the reorganization are subject to the approval of the court. (R. 152.)

(14) That the offer and acceptance of the plan are in good faith. (R. 152.)

(15) That debtor is authorized by its charter and by applicable state and federal laws to take all necessary steps to carry out the provisions of the plan. (R. 152.)

(16) That on motion of the court the plan of reorganization is further amended (in the several respects enumerated in paragraphs numbered "A" to "H"). (R. 153-154.)

(17) That the amendment to the plan of reorganization as proposed by the bondholders committees does not materially or adversely affect the interests of any creditors or stockholders who have heretofore assented to the plan. (R. 155.)

(18) That the amendments to the plan made on motion of the court do not materially or adversely affect the interests of any creditors or stockholders of the debtor; that the plan of reorganization as amended is fair, equitable and feasible and complies with the provisions of section 77B; that the plan of reorganization as hereby amended is approved, confirmed and decreed to be in full force and effect. (R. 155.)

(19) That the proposed amendments to the plan submitted by Anna Jacobson, *et al.*, are disallowed. (R. 155.)

(20) That the debtor and the said committees, with the cooperation of counsel for the debtor, for said committees

and for the petitioning creditors, are hereby directed to proceed forthwith to take such action and to prepare and execute or cause to be executed such documents as may be necessary fully to comply with and carry out the provisions of the said plan of reorganization, as amended, and the court hereby retains jurisdiction to supervise the preparation and execution of said documents and to pass upon and approve the provisions therein contained. (R. 155.)

(21) In the event 51% of the bondholders do not vote against the creation of a stock trust, the court designates Paul W. Cleveland and Melvin M. Hawley to serve as trustees and approves the nomination by the bondholders committees of Paul Steinbrecher as the third trustee. (R. 156.)

(22) That the debtor and the said committees shall report in writing to this court on or before July 9, 1935, all acts and things done and performed by them in the execution and consummation of said plan of reorganization as amended and the documents incidental thereto and this cause is hereby continued until said date without further notice for the purpose of examining and confirming said report. (R. 156.)

(23) Case also continued to June 25, 1935, at which time court will pass upon fees and charges in connection with the reorganization. (R. 156.)

(24) Provides for turnover of property to new corporation by the county treasurer of Cook county, now in possession as receiver. (R. 156.)

(25) Court reserves jurisdiction over stock trust, if created, over the trustees and the trust property for the purpose of safeguarding in all respects the rights of holders of trust certificates. (R. 157.)

(26) Bondholders enjoined from commencing or prose-

cuting proceedings against debtor, its successor or assigns, or against property of debtor or new corporation. (R. 157.)

(27) Committees directed to conduct referendum of bondholders on question of formation of stock trust and to report to the court result of referendum. (R. 158.)

(28) The court reserves jurisdiction herein to enter such further orders as hereinafter may be deemed necessary or proper in connection with carrying out the terms and provisions of said plan of reorganization, as amended, and of this order and for terminating this cause. (R. 158.)

APPELLEES' CONTENTIONS.

(1) The district court order of March 20, 1935 (p. 4, *supra*)—denying Nettie Meyer's motion to dissolve the interlocutory injunction, also denying her motion to dismiss the proceedings for lack of jurisdiction and for bad faith—from which order Nettie Meyer took her appeal in circuit court of appeals case no. 5491, was an order entered within the course of proceedings in bankruptcy, therefore appealable only upon discretionary allowance by the appellate court under section 24b of the bankruptcy act.*

(2) Said order of March 20, 1935, did not fall within any of the exceptions (specified in section 25a of the bankruptcy act) in which appeals in bankruptcy proceedings may be taken without discretionary leave of the appellate court.

(3) The order of May 20, 1935 (pp. 11-16, *supra*), from which Nettie Meyer took her appeal in circuit court of appeals case no. 5531, by leave of the district court, was likewise an order entered within the course of bankruptcy proceedings, therefore appealable only at the discretion of the appellate court under section 24b of the bankruptcy act.

* Sections 24 and 25 of the bankruptcy act, so far as relevant, are quoted at p. 19, *infra*.

(4) Said order of May 20, 1935, confirming the plan of reorganization, etc., did not include, either expressly or as a statutory corollary (as in the case of confirmation of a composition), a discharge in bankruptcy, therefore did not come within section 25a (2) of the bankruptcy act.

(5) The circuit court of appeals did not err, therefore, in dismissing the appeals taken by Nettie Meyer by leave of the district court only.

(6) Nor did said court err in declining to grant Nettie Meyer leave to appeal, within its discretionary authority under section 24b of the bankruptcy act, from said district court order of May 20, 1935.

Summary of the argument.

I.

The district court order of March 20, 1935 (p. 4, *supra*), denying Nettie Meyer's motion to dissolve the restraining order entered February 13, 1935 (pp. 2-3, *supra*), and to dismiss the proceedings for lack of jurisdiction and for bad faith, was reviewable only upon discretionary allowance of an appeal by the appellate court under section 24b of the bankruptcy act; therefore the circuit court of appeals did not err in dismissing the appeal taken from said order by leave of the district court (case no. 5491 of the circuit court of appeals, case no. 375 of this court).

A. Proceedings under section 77B are "proceedings in bankruptcy."

Section 77B, sub-section (k); 11 U. S. C. sec. 207; c. 424, sec. 1, 48 Stat. 912.*

B. Said order did not come within the appellate jurisdiction conferred on the supreme court and the several circuit courts of appeal by section 24a of the bankruptcy act over "controversies arising in bankruptcy proceedings," but only within the jurisdiction in equity conferred on the circuit courts of appeal by section 24b of the bankruptcy act "to superintend and revise in matters of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction;" such equity jurisdiction to be exer-

* *Section 77 B, sub-section (k):*

"* * * All other provisions of this title, except such as are inconsistent with the provisions of this section, shall apply to proceedings instituted under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors'; 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this section; the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the same consequence and effect as an order of adjudication."

cised in the form and manner of an appeal, to be allowed in the discretion of the appellate court (except in the cases enumerated in section 25a of the act).*

In re Community Finance Co. (C. C. A. 4), 295 Fed. 773, 776.

Vitagraph, Inc. v. *St. Louis Properties Corp.* (C. C. A. 8), 77 F. (2d) 590, 594.

See also cases cited under points I-C, I-D and I-E, *infra.*

C. Said order of March 20, 1935, refusing to set aside the prior approval of the 77B petition and dismiss the proceedings, was not appealable under section 25a (1) as tantamount to "a judgment adjudging or refusing to adjudge the defendant a bankrupt."

Vallely v. *Northern Fire & Marine Ins. Co.*, 254 U. S. 348, 65 L. ed. 297 (first headnote).

Vitagraph, Inc. v. *St. Louis Properties Corporation* (C. C. A. 8), 77 F. (2d) 590.

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* Section 24 of the bankruptcy act of July 1, 1898, as amended May 27, 1926 (11 U. S. C. sec. 47; c. 406, sec. 9, 47 Stat. 664):

"(a) The Supreme Court of the United States, the circuit courts of appeal of the United States, the Court of Appeals of the District of Columbia, and the supreme courts of the Territories, in vacation, in chambers and during their respective terms, are invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.

(b) The several circuit courts of appeal and the Court of Appeals of the District of Columbia shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law (and in matter of law and fact the matters specified in section 48 of this title) the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised by appeal and in the form and manner of an appeal, except in the cases mentioned in said section 48 of this title to be allowed in the discretion of the appellate court."

(c) All appeals under this section shall be taken within 30 days after the judgment, or order, or other matter complained of, has been rendered or entered.

Section 25a of the bankruptcy act of July 1, 1898, as amended May 27, 1926 (11 U. S. C. sec. 48 (a); c. 406, sec. 10, 44 Stat. 665):

"Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeal of the United States and the Court of Appeals of the District of Columbia and to the supreme courts of the Territories in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of $500 or over. Such appeal shall be taken within thirty days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be. * * *"

Credit Alliance Corporation v. *Atlantic, Pacific & Gulf Refining Co.* (C. C. A. 8), 77 F. (2d) 595.

St. Louis Can Co. v. *General American Life Ins. Co.* (C. C. A. 8), 77 F. (2d) 598 (cert. allowed by this court, case no. 157 October term 1935).

Wilkerson v. *Cooch* (C. C. A. 9), 78 F. (2d) 311.

Winston v. *Hoyne* (C. C. A. 7), 277 Fed. 668, 670-671, 674 (cert. den. 258 U. S. 623, 66 L. ed. 796).

In re De Camp Glass Gasket Co. (C. C. A. 6), 272 Fed. 558, 559-560 (cert. den. sub nom. *Hamilton* v. *De Camp Glass Casket Co.*, 256 U. S. 703, 65 L. ed. 1179).

Humber v. *Bankers Trust Co.* (C. C. A. 6), 70 F. (2d) 265.

In re Ann Arbor Mach. Corp. (C. C. A. 6), 274 Fed. 24, 25.

Brady v. *Bernard & Kittinger* (C. C. A. 6), 170 Fed. 576, 579-580 (cert. den. 217 U. S. 595, 54 L. ed. 896).

In re Ives (C. C. A. 6), 113 Fed. 911, 912.

Bank of Elberton v. *Swift* (C. C. A. 5), 268 Fed. 305, 308.

In re Lone Star Shipbuilding Co. (C. C. A. 2), 6 F. (2d) 192, 193.

Chicago Bank of Commerce v. *Carter* (C. C. A. 8), 61 F. (2d) 986, 989-991.

Missouri Valley Cattle Loan Co. v. *Alexander* (C. C. A. 8), 276 Fed. 266, 268.

B-R Electric & Telephone Mfg. Co. v. *Aetna Life Ins. Co.* (C. C. A. 8), 206 Fed. 885, 886-887.

D. Although the circuit court of appeals for the 10th circuit has held that an order approving a petition under section 77B is appealable under section 25a (1), it also held in the same case that an order overruling a motion to

dismiss the proceedings was not reviewable under section 25a, but only under section 24b.

Humphrey v. *The Bankers Mortgage Company of Topeka,* no. 1291; also *The Bankers Mortgage Company of Topeka* v. *Humphrey,* no. 1292; decided August 26, 1935, Commerce Clearing House Bankruptcy Law Service, par. 3597.

E. Unless within the exceptions mentioned in section 25a, an appeal allowed in bankruptcy proceedings by the district court confers no jurisdiction on the appellate court and must be dismissed.

Swift & Co. v. *Hoover,* 242 U. S. 107, 61 L. ed. 175.

Deeley v. *Cincinnati Art Publishing Co.* (C. C. A. 6), 23 F. (2d) 920.

Broders v. *Lage* (C. C. A. 8), 25 F. (2d) 288, 289-290.

See also the cases cited under point I-C, *supra.*

II.

The appeal of Nettie Meyer from said order of March 20, 1935 (C. C. A. case no 5491), even if maintainable, presents only the empty claim that the bankruptcy court must stand aside and permit her to prosecute her state court action for accounting, etc., against the debtor corporation and others.

Assignment of errors in C. C. A. case no. 5491:—R. 95.

A. The jurisdiction of the bankruptcy court was paramount.

Continental Illinois Nat'l Bank & Trust Co. v. *C. R. I. & P. Ry. Co.* (C. C. A. 7), 72 F. (2d) 443, 450-451; affd. 294 U. S. 648, 79 L. ed. 642.

Grand Boulevard Inv. Co. v. *Strauss* (C. C. A. 8), 78 F. (2d) 180.

Gross v. *Irving Trust Co.*, 289 U. S. 342, 344-345; 77 L. ed. 1243, 1244-1245.

In re Greyling Realty Corp. (C. C. A. 2), 74 F. (2d) 734, 736-737 (cert. den. 294 U. S. 725, 79 L. ed. 664).

In re Prudence-Bonds Corp. (C. C. A. 2), 75 F. (2d) 262, 263-264.

B. If there was antecedent fraud in the conduct of the affairs of the debtor corporation, to be taken into account in passing upon the proposal of reorganization, the bankruptcy court was not powerless to deal with such a claim.

In re Marine Transit Corp. (C. C. A. 2), decided Aug. 16, 1935; Commerce Clearing House Bankruptcy Law Service, par. 3620.

C. The appellants Anna Jacobson, Jacob Meyerhoff, Joseph Meyerhoff, Julius Meyerhoff, John C. Pankin and Rae Mann were not parties to the proceedings in the district court on March 20, 1935, nor to the appeal taken by Nettie Meyer in circuit court of appeals case no. 5491; but a month later, on April 20, 1935, without challenge to the jurisdiction of the district court, appeared for the first time by filing their claims (together with objections to certain claims and to the proposed plan of reorganization).

Statement of case, *supra*, p. 5.

D. Nettie Meyer denies the jurisdiction of the district court to proceed in face of her motion to dismiss the proceedings, overruled March 20, 1935, while her six co-appellants affirm the continued jurisdiction of the district court and ask for review of its later order confirming the plan of reorganization (though they did not pray an appeal from said order in the district court, or petition the circuit court of appeals for allowance of such appeal).

III.

The district court order of May 20, 1935, confirming the plan or reorganization, etc. (pp. 11-16, *supra*), was reviewable only under section 24b of the bankruptcy act, at the discretion of the circuit court of appeals; therefore said court did not err in dismissing the appeal from said order granted by the district court (case no 5531 of the circuit court of appeals, case no. 376 of this court).

Campbell v. *Alleghany Corp.* (C. C. A. 4), 75 F. (2d) 947; cert. den. case nos. 85-6, October 1935 term.

Broders v. *Lage* (C. C. A. 8), 25 F. (2d) 288.

Also cases cited under points I-A, I-C and I-E, *supra.*

A. The contention that said order is appealable in the same manner as a composition in bankruptcy is untenable, since an order confirming a composition discharges the bankrupt, whereas an order confirming a plan of reorganization does not discharge the debtor.

Sec. 14 (c) of bankruptcy act of July 1, 1898, as amended June 25, 1910; 11 U. S. C. sec. 32 (c); s. 412, sec. 6, 36 Stat. 839.

Sec. 12 (b), (d) and (e) of bankruptcy act of July 1, 1898, as amended June 25, 1910; 11 U. S. C. sec. 30 (b), (d) and (e); c. 412, sec. 5, 36 Stat. 839.

In re O'Gara Coal Co. (C. C. A. 7), 260 Fed. 742, 744.

U. S. ex rel. Adler v. *Hammond* (C. C. A. 6), 104 Fed. 862, 865.

In re Bay State Milling Co. (C. C. A. 2), 223 Fed. 778.

In re Gottlieb (C. C. A. 2), 262 Fed. 730, 732.

C. Section 77B, in sub-section (h), specifically provides for discharge of the debtor, if any, not upon confirmation of the plan of reorganization, but only by final decree after the debtor has complied with all requirements of the confirmation order and the plan has been consummated.

Sec. 77B, sub-section (h); 11 U. S. C. sec. 207; June 7, 1934, c. 424, sec. 1, 48 Stat. 912.*

D. In a composition proceeding the debtor is required, before entry of the order confirming the composition, to do everything necessary to carry out the composition, leaving only distribution of the consideration; whereas in a reorganization proceeding the confirmation order is merely preliminary to the many acts to be performed by the debtor and others in consummating the reorganization.

Statement of case; synopsis of confirmation order, pp. 11-16, *supra*.

IV.

The appeal from the confirmation order was taken by Nettie Meyer alone; therefore the other six appellants who appear in this court cannot be heard to complain of the order dismissing said appeal.

Petition for appeal:—R. 166.
Order of district court granting appeal:—R. 168.
Appeal bond:—R. 168, 96-97.

A. Nettie Meyer made no objections to the proposed plan of reorganization and offered no amendments; in fact, took

* *Section 77B, sub-section (h):*
"* * * Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, if any, making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Such final decree shall discharge the debtor from its debts and liabilities, and shall terminate and end all rights and interests of its stockholders, except as provided in the plan, or as may be reserved as aforesaid. * * *"

no part in the district court proceedings subsequent to March 20, 1935; therefore, in her second appeal (C. C. A. case no. 5531), is necessarily limited to the same questions raised in her first appeal (C. C. A. case no. 5491).

V.

The circuit court of appeals did not err in declining to exercise its discretionary power under section 24b of the bankruptcy act to grant Nettie Meyer leave to appeal from the district court order of May 20, 1935, confirming the plan of reorganization.

A. Nettie Meyer alone signed the petition addressed to the circuit court of appeals, filed June 6, 1935, for leave to appeal from said confirmation order.

Petition for leave to appeal:—R. 172-176.

B. The six other appellants who appear in this court did not become parties to said petition of Nettie Meyer merely by the recital in the affidavit attached to said petition, made by Mr. Meyer Abrams, that "he is the attorney for the petitioner and for the other objectors, who join her in said petition prepared by him." (R. 176.)

Jackson v. *Hosmer*, 14 Mich. 88.

C. When the circuit court of appeals denied said petition of Nettie Meyer, on June 25, 1935 (R. 177-178)—more than 30 days after the entry of said confirmation order of May 20, 1935—it was too late for said six appellants to attempt, by subsequent petition, to make themselves parties to the original petition for leave to appeal filed by Nettie Meyer alone.

Petition filed in circuit court of appeals on June 28, 1935:—R. 178-180.

Order of circuit court of appeals on said petition, July 9, 1935, entered in case no. 5491:—R. 105.

D. Approval or disapproval of a plan of reorganization, proposed and accepted in conformity with the provisions of section 77B of the bankruptcy act, is essentially a matter for the discretion of the trial court.

In re Pilsener Brewing Co. (C. C. A. 9), 79 F. (2d) 63, 68.

In re New Rochelle Coal & Lumber Co. (C. C. A. 2), 77 F. (2d) 881, 883.

Campbell v. *Alleghany Corp.* (C. C. A. 4), 75 F. (2d) 947, 955.

Kansas City Terminal Ry. Co. v. *Central Union Trust Co.* (C. C. A. 8), 28 F. (2d) 177, 185 (cert. den. 278 U. S. 655).

Jameson v. *Guaranty Trust Co.* (C. C. A. 7), 20 F. (2d) 808, 811 (cert. den. 275 U. S. 569).

E. While mere numbers may not be controlling, it is significant that with ample notice and full opportunity to be heard the holders of only $9,000 out of $1,373,000 unsubordinated first mortgage bonds questioned the fairness of the plan of reorganization as confirmed by the court.

Statement of the case, p. 5, *supra.*

F. It is not required by section 77B of the bankruptcy act, nor by the due process clause of the fifth amendment, nor by the general principles of equity, that in the reorganization of a corporation entitled to relief in bankruptcy the claims of creditors shall be preserved either (a) to their full extent or (b) with exactly the same priorities; but on the contrary, the purpose of the statute to rehabilitate financially embarrassed corporations necessarily calls for compromise, readjustment and scaling down of obligations in a manner (a) to end further controversy between creditors of different classes and (b) to cure existing defaults and avoid future defaults.

Canada Southern Rd. Co. v. *Gebhard,* 109 U. S. 527, 27 L. ed. 1020, 1023-1024.

Campbell v. *Alleghany Corp.* (C. C. A. 4), 75 F. (2d) 947, 954-955.

Kansas City Terminal Ry. Co. v. *Central Union Trust Co.*, 271 U. S. 445, 454, 70 L. ed. 1028, 1032.

Jameson v. *Guaranty Trust Co.* (C. C. A. 7), 20 F. (2d) 808, 811 (cert. den. 275 U. S. 569).

In re Central Funding Corp. (C. C. A. 2), 75 F. (2d) 256, 260-261.

In re Prudence-Bonds Corp. (C. C. A. 2), 77 F. (2d) 328, 330.

In re Island Park Associates, Inc. (C. C. A. 2), 77 F. (2d) 334, 337.

In re Hotel Gibson Co. (D. C., S. D. Ohio), 11 F. Supp. 30, 36.

In re Bush Terminal Co. (D. C., E. D. N. Y.), 10 F. Supp. 315, 316.

G. The aim of section 77B to restore embarrassed debtors and their property to normal commercial status, by terminating prolonged and costly receiverships—frequently fostered by the maneuvers of a few dissenting security holders who hope to gain special advantage by blocking the efforts of the majority to bring about a reorganization—would be subverted if such dissenters were permitted by means of insubstantial appeals to delay the reorganization proceedings.

In re Sterba (C. C. A. 7), 74 F. (2d) 413, 416-417.

Guaranty Trust Co. v. *Chicago M. & St. P. Ry. Co.* (D. C., N. D. Ill.), 15 F. (2d) 443, 444.

Palmer v. *Bankers Trust Co.* (C. C. A. 8), 12 F. (2d) 747, 754.

Broders v. *Lage* (C. C. A. 8), 25 F. (2d) 288, 290.

ARGUMENT.

I.

Order of March 20, 1935, not appealable under section 24a. (No. 375 of this court; no. 5491 C. C. A.)

In support of her first appeal, Nettie Meyer cites* *McGonigle* v. *Foutch* (C. C. A. 8), 51 F. (2d) 455; *Molina* v. *Murphy* (C. C. A. 1), 71 F. (2d) 6[illegible]5; *Lamb* v. *Townshend* (C. C. A. 4), 71 F. (2d) 590; *Irving Trust Co.* v. *Fleming* (C. C. A. 4), 73 F. (2d) 423; *In re B. & R. Glove Corp.* (C. C. A. 2), 279 Fed. 372; *Clark* v *Huckaby* (C C. A. 8), 28 F. (2d) 154 (quoting from *Taylor* v. *Voss,* 271 U. S. 176); *Bryan* v. *Speakman* (C. C. A. 5), 53 F. (2d) 463:—cases in which the orders under consideration were held appealable as *controversies arising in bankruptcy proceedings,* as distinguished from orders entered *within the course of bankruptcy proceedings.*

Before commenting on these cases, we remind the court of the exact situation in the case at bar. The creditors' petition was filed February 4, 1935, the debtor's answer February 13, 1935. On the date of the answer the court found that the creditors' petition complied with the statute and was filed in good faith; ordered that the petition stand approved; ordered that creditors be restrained from otherwise proceeding against the debtor corporation or its property until further order of the court; authorized the state court receiver (in the tax receivership action) to continue in possession of the debtor's property until further order of the court. (pp. 2-3, *supra*).

Nettie Meyer commenced her state court action February 8, 1935; filed her petition in the bankruptcy court to

* Petition for certiorari, pp. 16-18.

dismiss the 77B proceedings on February 25, 1935. On said petition and the several motions to dismiss the petition, the court entered the order of March 20, 1935, denying "the prayer contained in the petition of Nettie Meyer to dissolve the injuiction and to dismiss the proceedings for lack of jurisdiction and for bad faith." (R. 93.)

It thus appears that Nettie Meyer came into the federal court by her petition of February 25, 1935, to endeavor to persuade that court to abandon the pending bankruptcy proceeding in favor of her state court action for accounting against numerous parties, including the debtor corporation—*a suit started four days after the filing of the petitioner under section 77B.*

Precisely, she asked that the district court set aside its former finding that the creditors' petition for reoganization was filed in good faith; and thereby annul its approval of said petition, by force whereof the district court had acquired "exclusive jurisdiction of the debtor and its property wherever located for the purpose of this section."*

The approval of a petition for reorganization under section 77B, by express provision of the statute, is given (for all purposes of the reorganization proceeding) the effect of an adjudication in bankruptcy (p. 18, *supra,* footnote). A motion to dismiss the proceedings, after such approval, is essentially the same as a motion to vacate an adjudication of bankruptcy. That an order refusing to vacate an adjudication emanates from a "proceeding in bankruptcy," not a "controversy arising in bankruptcy proceedings," is established by the overwhelming array of decisions of this court and of the several circuit courts of appeal. (*In re Community Finance Co.* (C. C. A., 4), 295 Fed. 773, and cases therein cited at p. 776; also the cases above cited in summary of argument, points I-C, I-D and I-E, pp. 19-21, *supra.*)

* Sub-section (a), section 77B; 11 U. S. C. section 207.

In *Vallely* v. *Northern Fire & Marine Ins. Co.*, 254 U. S. 348, 41 S. Ct. 116, 65 L. ed. 297, this court held that a petition to revise in matter of law under section 24b of the bankruptcy act was the proper remedy to review an order of an inferior court of bankruptcy vacating an adjudication and dismissing the proceeding for want of jurisdiction. Obviously, the right of appeal in such a case does not turn upon the result of the motion; that is, whether the trial court vacates the order of adjudication or abides by its former ruling. (*In re De Camp Glass Casket Co.* (C. C. A. 6), 272 Fed. 558, 559.)

As we shall show at a later point, the question has frequently been raised whether an order vacating or refusing to vacate a prior adjudication is appealable under section 25a, as tantamount to an order adjudging or refusing to adjudge the defendant a bankrupt (with virtual unanimity of decision in the negative, especially since the announcement made by this court in the *Vallely* case). But the claim now asserted by appellants that such an order is appealable under section 24a as a controversy arising in bankruptcy proceedings, rather than an order within the course of bankruptcy proceedings, has apparently seldom been advanced and never successfully. That the cases cited by appellants deal with orders of a fundamentally different nature is quite obvious, as follows:

> *McGonigle* v. *Foutch*, 51 F. (2d) 455, 459:—Appeals allowed both by district court and appellate court from order, on petition of trustee in bankruptcy, restraining further prosecution of state court proceedings to foreclose mechanics' liens and deed of trust (the liens having been acquired more than four months before the petition in bankruptcy was filed). A majority of circuit court of appeals (Mr. Justice Booth dissenting on this point) were of the opinion that the order arose in a "controversy" in bankruptcy, rather than a "proceeding" in bankruptcy, and was otherwise of the character requisite to make it appealable under section 129 of the judicial code (28 U. S. C., sec. 227).

Molina v. *Murphy*, 71 F. (2d) 605:—In a proceeding under section 74 of the bankruptcy act, on petition of the debtors, the federal court entered an order restraining sales under decree in a foreclosure suit commenced in the district court of San Juan some eight months before the petition under section 74 was filed. At the time the section 74 petition was filed the property on which the mortgage lien existed was in possession of receivers appointed by the district court of San Juan. Obviously, this was an order entered in a "controversy" between the petitioning debtors and the receivers who held possession of the mortgaged property, not an order within the course of the bankruptcy proceeding.

Lamb v. *Townshend*, 71 F. (2d) 590, 594:—Appeal by receiver of insolvent state bank from turnover order entered summarily in bankruptcy proceeding, on petition of trustee in bankruptcy. "We think that, as the proceeding was instituted by the trustee for the recovery of property in the possession of the receiver, to which the latter asserted an adverse claim, it is 'a controversy arising in a bankruptcy proceeding,' as distinguished from an administrative 'proceeding' in bankruptcy, and that it is reviewable by appeal under section 24a."

Irving Trust Co. v. *Fleming*, 73 F. (2d) 423, 429:—Appeal from order dismissing petition of trustee in bankruptcy of McCrory Stores Corporation, which petition sought a summary order requiring state court receivers to turn over to the trustee in bankruptcy property seized by them from the trustee. Obviously, the dispute between the bankruptcy trustee and the state court receivers over the property in question was a "controversy arising in a bankruptcy proceeding," therefore the order was reviewable under section 24a.

In re B. & R. Glove Corp., 279 Fed. 372, 375:—"This is a proceeding by a creditor of the bankrupt to reclaim property in the hands of the receiver, and this court in the case of *in re Toole*, 270 Fed. 195, held that a reclamation by a third party of his own property in the hands of a trustee is a controversy arising in bankruptcy proceedings, and the proper remedy is appeal under section 24a, and not a petition to revise under section 24b of the bankruptcy act."

Clark v. *Huckaby*, 28 F. (2d) 154, 156-157.—Order appealed from sustained lien of chattel mortgage on bankrupt's stock of merchandise and store fixtures, as against the claim of the receiver in bankruptcy. "The intervener did not assert a claim for the balance due on the mortgage notes. He asked to be declared the owner of the property in the hands of the receiver (in bankruptcy). The purpose of the action was to establish a lien upon certain property, independent of, and not incidental to, the allowance of a demand. • • • The issue here presented is properly reviewable as a controversy arising in a bankruptcy proceeding under section 24a, as amended, of the bankruptcy act."

Bryan v. *Speakman*, 53 F. (2d) 463, 465:—Bankruptcy court denied petition of state court receiver for possession of certain property in the hands of bankruptcy trustee. Held: final order in a controversy arising in bankruptcy proceedings, therefore appealable as of right under section 24a.

Taylor v. *Voss*, 271 U. S. 176, 70 L. ed. 889:—Trustee in bankruptcy filed petition in bankruptcy proceeding alleging that testamentary trustee of bankrupt's deceased wife claimed an interest in the real estate of the bankrupt, and praying that such interest be fixed and right to sell the real estate free from such claim be declared. The testamentary trustee answered, alleging that the bankrupt's wife, prior to her death, had become absolutely vested with a wife's interest in the real estate of her husband, also praying that the court fix this interest. The referee held that the testamentary trustee was entitled to receive one-fifth of proceeds of sale of the real estate. Order confirmed by district court judge. Petition by trustee in bankruptcy in circuit court of appeals to review this order in matter of law, under section 24b. Motion by testamentary trustee to dismiss this petition on ground that it presented a controversy arising in the bankruptcy proceeding which could be reviewed only by appeal under section 24a. Motion denied by circuit court of appeals, on ground that while the petition presented such a controversy the matter might nevertheless be considered as though it had been brought up by appeal under section 24a. The circuit court of appeals reversed the order of the district court, whereupon this court granted

a writ of certiorari. Held: on the procedural question, that a "controversy" in bankruptcy, though appealable under section 24a, may also be reviewed in matter of law only (when the facts are undisputed) by a petition to revise under section 24b.

* * * * *

To summarize, the cases cited by appellants involve controversies between (a) claimants of specific property and (b) the bankruptcy estate (represented, generally, by a trustee or receiver). The appeal, in such controversy, does not automatically suspend the bankruptcy proceedings, though it may ultimately affect the extent of the estate. Stated another way, the appeal does not take to the appellate court the bankruptcy proceedings, as such, but only a collateral controversy that has arisen between "C" (claimant) and "T" (trustee), or between other adversaries similarly opposed.

In the case at bar, as it happens, all the property of the debtor corporation was in the hands of a receiver appointed in a state court action to subject the property to the payment of taxes. (R. 36:—par. 3 of order of February 13, 1935.) Nettie Meyer held no property belonging to the debtor corporation; nor did she claim that the debtor corporation, or any representative of the bankruptcy estate, held any specific property that belonged to her, or to which she had right of possession. No controversy arose between her and anyone else as an incident of the bankruptcy proceedings. She simply wanted the proceedings stopped, or indefinitely suspended, so that she might go ahead *ad libitum* with her personal program of litigation in another court, albeit a court of inferior jurisdiction;—litigation seeking general administration of the property and business of the debtor corporation by the state court rather than the bankruptcy court, not the protection of some property right to which she made claim against all persons interested in the bankruptcy estate.

SECTION 25a(1).

The appellant Nettie Meyer asserts no right of appeal from the order of March 20, 1935, under section 25a(1) of the bankruptcy act. However, such claim was asserted in the petition for certiorari in *St. Louis Can Co.* v. *General American Life Ins. Co.*, case no. 157 October term 1935 (certiorari granted October 14, 1935), wherein the district court set aside and vacated its former order approving the debtor's voluntary petition under section 77B and dismissed the proceedings, and the appellate court dismissed the appeal prayed in the district court. Because of the grant of certiorari in the *St. Louis Can Co.* case, we have considered the authorities with respect to the appealability of such an order under section 25a(1).

We find no recent conflict of authority on the question whether an order entered upon a motion to set aside a prior order approving a petition under section 77B is reviewable under section 25a of the bankruptcy act. All the decisions, so far as we can discover, agree that such an order is not reviewable under section 25a, but only by leave of the appellate court under section 24b.

We call attention, first, to analogous cases preceding the enactment of section 77B of the bankruptcy act, as follows:

> *Winston* v. *Hoyne* (C. C. A. 7), 277 Fed. 668:—Adjudication on voluntary petition filed by two petitioners as alleged sole members of partnership. Petition by Winston (presumably a creditor) to vacate order of adjudication, upon claim that there were 14 other partners and no insolvency. Petition dismissed. Review sought both by appeal and by petition to review and revise. Held: Order not appealable, reviewable only by petition to review and revise. Appeal dismissed; and on petition to revise, order affirmed. (Certiorari denied, 258 U. S. 623, 66 L. ed. 796.)
>
> *In re De Camp Glass Casket Co.* (C. C. A. 6), 272 Fed. 558:—Adjudication of bankruptcy upon voluntary pe-

tition of corporation. Petition by stockholders to set aside adjudication; order setting aside adjudication on ground that directors were without power to authorize filing of voluntary petition for adjudication without vote of stockholders. Petition to revise under section 24b. Motion to dismiss petition to revise on ground that order was not reviewable under section 24b, but only under section 25a(1). Held: Order not appealable under section 25a, but reviewable only under section 24b; that so far as concerns method of review, it is immaterial whether the motion to vacate is granted or denied. (Certiorari denied, sub nom. *Hamilton* v. *De Camp Glass Casket Co.*, 256 U. S. 703, 65 L. ed. 1179.)

Humber v. *Bankers Trust Co.* (C. C. A. 6), 70 F. (2d) 265:—Adjudication of bankruptcy on voluntary petition. Receiver appointed in creditors' state court proceeding filed petition to vacate adjudication and dismiss voluntary petition for want of jurisdiction. Petition granted. Appeal allowed by the district court dismissed by the appellate court. On authority of *Vallely* v. *Northern Fire & Marine Ins. Co.*, 254 U. S. 348, the court overruled its former contrary holding in *Michigan Garage & Accessory Co.* v. *Drury*, 31 F. (2d) 434.

Brady v. *Bernard & Kittinger* (C. C. A. 6), 170 Fed. 576:—Order of adjudication on involuntary petition. Motion by alleged creditors (together with alleged bankrupt) to set aside order of adjudication, on ground that bankrupt's consent to adjudication had been filed by his attorney without authority. Motion to set aside order of adjudication overruled. On the appeal taken from the judgment of adjudication, motion to dismiss granted by the appellate court because not taken within the required time. On the appeal from the order refusing to set aside the adjudication, dismissed by the court on its own motion for the reason that the order was not subject to appeal, but reviewable only under section 24b. Quoting from the opinion of the court (by Mr. Justice Sanford):

> "While the line of demarcation between the classes of cases respectively appealable and reviewable is not always distinctly marked, it is clear that the proceedings under the motion to set

aside the judgment adjudicating Brady a bankrupt related to an administrative matter which arose in the ordinary course of the administration of the bankrupt estate, under the power of the court to set aside a judgment improperly obtained as an incident to the principal cause and without recourse to an original proceeding for that purpose (*Doss* v. *Tyack*, 14 How. 297, 14 L. ed. 428), and that the order or judgment overruling the motion to set aside the adjudication would have been reviewable by this court in matter of law upon a petition for review seasonably filed in this court. It was expressly held by this court in the case of *In re Ives*, 113 Fed. 911, 51 C. C. A. 541, that an order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication in bankruptcy is not a judgment from which an appeal will lie, under section 25 of the bankruptcy act, but is reviewable by petition in matters of law. And in the case of *Plymouth Cordage Company* v. *Smith*, 194 U. S. 311, 24 Sup. Ct. 725, 48 L. ed. 992, in which it was held that the circuit court of appeals had jurisdiction to revise in matter of law the proceedings of a district court in Oklahoma, in bankruptcy, it appears that one of the particulars in which it was sought to review such proceedings was the refusal of the district court to permit certain creditors of the bankrupt to file a motion to set aside an order dismissing a petition in involuntary bankruptcy. Clearly, the revisory power in reference to setting aside an order dismissing a petition in bankruptcy would be the same as that in reference to an order refusing to set aside an adjudication of bankruptcy."

(Certiorari was denied in this case, 217 U. S. 595, 54 L. ed. 896.)

In re Ives (C. C. A. 6), 113 Fed. 911: On voluntary petition, partnership and individual members thereof adjudged bankrupt. Petition by creditor (and trustee holding security for creditor) to set aside adjudication on the ground that Albert Ives, Sr., at the time he executed power of attorney to file a petition in bankruptcy and at the time of adjudication, was mentally incompetent, therefore the proceedings were void

as to him. Demurrer to this petition sustained. Petition to revise filed in the circuit court of appeals.

> "The trustee urges in this court that the remedy of the petitioners, if any, is by an appeal from the order sustaining the demurrer, and that the 10 days provided for an appeal expired before the petition here was filed. * * * An order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication is not referred to in this section (*viz.*, section 25), and is not a judgment from which an appeal will lie within its purview. It rather comes within section 24, authorizing the circuit court of appeals 'to superintend and revise in matters of law proceedings of the several inferior courts of bankruptcy within their jurisdiction,' which provides a summary mode of reviewing the orders of the bankruptcy courts upon questions of law on petitions filed in the appellate court by parties aggrieved."

In the following cases, likewise, orders refusing to set aside former adjudications of bankruptcy were held reviewable only under section 24b:

In re Ann Arbor Mach. Corp. (C. C. A. 6), 274 Fed. 24.

Bank of Elberton v. *Swift* (C. C. A. 5), 268 Fed. 305.

In re Lone Star Shipbuilding Co. (C. C. A. 2), 6 F. (2d) 192.

Chicago Bank of Commerce v. *Carter* (C. C. A. 8), 61 F. (2d) 986.

Missouri Valley Cattle Loan Co. v. *Alexander* (C. C. A. 8), 276 Fed. 266.

B-R Electric & Telephone Mfg. Co. v. *Aetna Life Ins. Co.* (C. C. A. 8), 206 Fed. 885.

In the light of the foregoing cases, also the many additional authorities therein cited, we submit that an order refusing to set aside a prior order approving a petition filed under section 77B of the bankruptcy act is reviewable only by discretionary leave of the appellate court under

section 24b, as was held by the circuit court of appeals for the 7th circuit in the present case and by the circuit court of appeals for the 8th circuit in *Credit Alliance Corporation* v. *Atlantic, Pacific & Gulf Refining Co.*, 77 F. (2d) 595.

In *Wilkerson* v. *Cooch* (C. C. A. 9), 78 F. (2d) 311, a proceeding under section 75 of the bankruptcy act (11 U. S. C., sec. 203), instituted by debtor as an alleged farmer, a secured creditor filed a petition praying that the proceedings be dismissed on the ground that the debtor was not a farmer within the meaning of the statute. The court found that the debtor did not come within the term "farmer" as defined in the act. The petition of the intervening creditor was granted and debtor's petition dismissed. From this order, an appeal was allowed by the trial judge. On motion of appellee to dismiss the appeal, the court said:

> "We are not dealing with an appeal from the implied adjudication resulting from the filing of the petition which, under the statute (11 U. S. C. A., sec. 75 (n), is the equivalent of an adjudication in bankruptcy, but from an order of dismissal made on application of a creditor to set aside the implied adjudication and to dismiss the proceedings.
>
> An order setting aside an adjudication in bankruptcy previously entered in the case and not appealed from is not appealable under 11 U. S. C. A., sec 48 (a) which permits an appeal 'from a judgment adjudging or refusing to adjudge the defendant a bankrupt,' but is appealable only under the provisions of 11 U. S. C. A., sec. 47 (b) when allowed by the circuit court of appeals in the exercise of its discretion. This conclusion follows, we think, from the decision in *Vallely* v. *Northern Fire & Marine Ins. Co.*, 254 U. S. 348 * * *."

We note, finally, the decision rendered August 26, 1935, by the circuit court of appeals for the 10th circuit in *Humphrey* v. *The Bankers Mortgage Company.**

*Opinion not officially reported at time of preparation of this brief, but quoted in Commerce Clearing House Bankruptcy Law Service, par. 3597.

An involuntary petition under section 77B was filed by creditors October 22, 1934. On November 12, 1934, the debtor corporation and its state court receiver filed a motion to dismiss said petition. This motion was overruled April 3, 1935, but was followed by a motion to set aside said order of April 3, 1935, which likewise was denied. Thereafter, on May 18, 1935, an order was entered finding that the involuntary petition was filed in good faith and approving it.

On the same day, May 18, 1935. the debtor corporation filed a voluntary petition under section 77B, which was immediately approved by another judge of the same court. In the second case the petitioning creditors in the involuntary proceedings interposed a motion to dismiss the subsequent voluntary proceeding on the ground that by the approval of the petition in the former case the court had acquired and exercised exclusive jurisdiction of the debtor and its property and that in consequence the later filing of the voluntary petition conferred no jurisdiction upon the court. This motion was overruled (on the finding, among others, that the petitioning creditors in the involuntary proceeding did not have claims against the corporation in excess of the securities held by them).

The other orders made in the two cases are not here relevant. A series of appeals were taken in both cases, all by leave of the district court only, among them: (1) an appeal by the debtor corporation from the order in the involuntary proceeding approving the creditors' petition; (2) an appeal by the debtor corporation and its receiver from the order in the involuntary proceeding refusing to set aside the order of April 3, 1935, which denied the motion made November 12, 1934, to dismiss the petition; (3) an appeal in the voluntary proceeding, by the petitioning creditors in the involuntary proceeding, from the order

denying their motion to dismiss the voluntary proceedings.

Of the three appeals above mentioned, only the first was entertained by the circuit court of appeals, on the ground that an order approving a petition under section 77B was equivalent to an order adjudging the debtor a bankrupt, therefore appealable under section 25a(1). However, the second and third appeals above mentioned were dismissed, on the court's own motion, for the reason that the orders were made in a proceeding in bankruptcy and were reviewable only by leave of the appellate court under section 24b (citing *Campbell* v. *Alleghany Corp.*, 75 F. (2d) 947).

We have no occasion, under the facts of the present case, to discuss the appealability of an order approving a petition for reorganization under section 77B. We merely comment, in passing, that although section 77B gives to the order approving the petition the effect of an adjudication in bankruptcy, it does so only for the purposes of the reorganization proceedings; that it expressly provides, in sub-section (c) (8), that if a plan of reorganization is not proposed or accepted within such reasonable period as the judge may fix, or if proposed and accepted is not confirmed by the court, and if the judge has not found the debtor to be insolvent, the proceeding may be dismissed without liquidation of the estate.

But, whatever may be the true rule as to appealability of an order approving a petition under section 77B, it seems beyond dispute on principle and authority that an order refusing to set aside a prior order approving such petition and dismissing the proceedings is reviewable only under section 24b of the bankruptcy act, at the discretion of the appellate court. An appeal from such an order, granted by the district court, confers no jurisdiction on the appellate court and must be dismissed. (See cases cited under points I-C and I-E, pp. 19-20, 21, *supra.*)

II.

The appeal in case no. 375 (C. C. A. 5491), even if maintainable, presents no substantial issue.

The errors assigned on this appeal (R. 95), although seven in number, merely reiterate in different form a single proposition: that because Nettie Meyer had filed her complaint in the state court, as set forth in the petition filed by her in the bankruptcy court, the latter court was required to yield its jurisdiction.

As we understand the position of appellants, the bankruptcy court was bound to accept Nettie Meyer's state court complaint at its face value, however unfounded the charges. Indeed, throughout the petition for certiorari, the allegations, innuendoes and conclusions of said complaint are stated to this court not as mere charges, but as established facts. The issue raised by (a) Nettie Meyer's petition to dismiss the 77B proceedings, and (b) the several motions of appellees to strike or dismiss her petition (R. 83-90), was not the truth or falsity of her state court complaint, but whether the mere filing of such a complaint debarred the bankruptcy court from exercising further jurisdiction in a case otherwise cognizable under section 77B.

Nettie Meyer assigned as error that "it affirmatively appears that there is no creditor and no debtor involved in these proceedings." (R. 95, assignment no. 3.) This statement is many times repeated, in variant form, in the petition for certiorari. For example, at page 20 of the petition: "The new corporation did not assume the debt. It was a mere paper organization for the reorganization purposes. It in fact never existed."

Nettie Meyer, in her petition in the bankruptcy court, stated that the debtor corporation was in existence more

than three years ago; that on October 27, 1932, it received conveyance of the title to the hotel property. (R. 50.). The petitioning creditors, in their verified petition for reorganization under section 77B, alleged that the several petitioners were creditors of the debtor as owners, in the aggregate, of $7,000 "Sovereign" and $8,000 "Sovereign Annex" first mortgage bonds, "all of which are obligations of the debtor." (R. 7, par. 15.) This was admitted by the debtor in its verified answer. (R. 34, par. 1.) If appellants desired to controvert the truth of the facts alleged in the creditors' petition, or the debtor's answer, they were at liberty to do so under the provisions of sub-section (a) of the statute, as follows (11 U. S. C. sec. 207 (a)):

> "If three or more creditors* who have provable claims which amount in the aggregate in excess of the value of securities held by them, if any, to $1,000 or over, or if stockholders holding 5% in number of all shares of stock of any class of the debtor outstanding shall, prior to the hearing provided for in subdivision (c), clause (1) of this section appear and controvert the facts alleged in the petition or answer, the judge shall determine as soon as may be the issues presented by the pleadings, without the intervention of a jury, and unless the material allegations of the petition or answer are sustained by the proofs, the proceedings shall be dismissed."

The truth of the creditors' petition and the debtor's answer stands unchallenged on the record of this case. Moreover, the statement of evidence upon the hearing on the plan of reorganization shows without dispute that the debtor corporation had assumed payment of the outstanding first mortgage bonds. (R. 160, par. 5.)

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*Section 77B, sub-sec. (b); 11 U. S. C. sec. 207 (b):

"* * * The term 'creditor' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this title."

How, then, does it affirmatively appear that there is no creditor and no debtor in these proceedings? What motives prompted various participants in the reorganization proceedings of the debtor corporation is immaterial. The question for the court was whether the petition and answer presented all the essential elements calling for the exercise of jurisdiction under the statute.

Quite appropriate is the statement of the court in *Bank of Elberton* v. *Swift* (C. C. A. 5), 268 Fed. 305, in response to the claim that the purpose of the bankruptcy proceeding was to avoid payment of objector's note out of an anticipated legacy (p. 308):

> "It does not seem to us that the act takes into account the motives of creditors in involuntary proceedings, or of debtors in voluntary proceedings; but instead of that, in view of the fact that such a practical subject as business relations between debtor and creditors is being dealt with, it concerns itself rather with conditions as they exist, and undertakes to fix definitely the obligations of the debtor and the rights and remedies of the creditor. In our judgment it was thought best by congress to prescribe general rules, which would usually promote satisfactory results, notwithstanding the fact that in isolated instances it would be difficult, if not impossible, to attain to the high standards of exact justice."

No argument is needed to demonstrate the compelling need in the case at bar for the exercise of jurisdiction under section 77B of the bankruptcy act: (1) holders of $1,373,000 unsubordinated first mortgage bonds and holders of $449,254.01 subordinated claims against the debtor and its property, seeking to protect their interests by preserving and rehabilitating the hotel enterprise; (2) a business dependent upon the continued operation as a single unit of two buildings covered by two separate mortgages; (3) foreclosure decrees entered back in 1932, but not yet consummated by sales, first, because no satisfactory cash sale

could be made in the current market, second, because the majority bondholders could not themselves buy in the properties at foreclosure sales for lack of ability to make the requisite cash payments (over and above the credits on their bonds); (4) need of compromise between senior claimants and junior claimants, through an equitable plan of reorganization, in order to avoid years of continued litigation and receivership; (5) need to restore the enterprise to a normal commercial status, as speedily as possible, so that the reorganized corporation might by improved earnings or new financing be freed from the further penalties of unpaid general property taxes.

Nor need we dwell upon the elementary proposition of law that jurisdiction in bankruptcy, once it attaches, is paramount. (Cases under point II-A, pp. 21-22, *supra*.) In short, no legal or equitable reason was shown by Nettie Meyer for discontinuance of the reorganization proceedings. These proceedings in no way hindered the prosecution by Nettie Meyer of any purported cause of action in her favor against those from whom she purchased her $1,000 bond, or against the mortgage trustee, or against other parties named as defendants in her state court complaint (except the debtor corporation). If, on the other hand, Nettie Meyer desired on behalf of herself and others to prosecute claims for accounting against third parties in favor of the debtor corporation, she had and still has ample opportunity so to do by leave of the bankruptcy court. Certainly that court is not lacking in power to deal with claims of antecedent fraud in the conduct of the affairs of the debtor corporation; nor lacking in desire to see that such claims are pressed, if shown to be to the advantage of the debtor corporation and its creditors. (Oral opinion of trial court, R. 90-93; also memorandum of trial court *re* plan of reorganization, R. 164-165.)

* * * * * *

Incidentally, although the joint petition for certiorari was filed in this case by seven petitioners, one of them, Nettie Meyer, claims that the district court erred in going ahead with the proceedings after she presented her petition of February 25, 1935; whereas the other six petitioners came into the proceedings for the first time on April 20, 1935, without challenge to the jurisdiction of the court, and participated in the subsequent hearing on the plan of reorganization.

III.

Order confirming plan of reorganization reviewable only under section 24b, at discretion of circuit court of appeals.

(No. 376 of this court; no. 5531 C. C. A.)

Two appeals were taken in *Campbell* v. *Alleghany Corporation* (C. C. A. 4), 75 F. (2d) 947,* from the order of the district court confirming a plan of reorganization under section 77B of the bankruptcy act; one appeal by allowance of the reviewing court under section 24b, the other by allowance of the district court. On the question of the appealability of the order, the circuit court of appeals said as follows (p. 955):

> "As subdivision (k) of section 77B (11 USCA sec. 207 (k) provides that proceedings under that section shall be deemed 'bankruptcy proceedings' or 'proceedings in bankruptcy' and shall be governed by the provisions of the general bankruptcy act when same are not inconsistent with the provisions of the section, and as proceedings in bankruptcy, except in the three cases mentioned in section 25, as amended, 11 USCA sec. 48, are reviewable only by appeal to superintend and revise under section 24b, as amended, 11 USCA sec. 47 (b), it follows that the proper method of re-

*Certiorari denied, case nos. 85-6 October 1935 term.

viewing the order below was by appeal to superintend and revise under section 24b. The order appealed from will be affirmed, therefore, in no. 3831; and the appeal in no. 3845 will be dismissed."

* * * * * *

Appellants contend that a confirmation order in a 77B proceeding is essentially the same as a confirmation order in a composition proceeding; that the result in both cases is a discharge in bankruptcy; that the reasoning by which an order confirming the composition is held appealable as of right applies also to an order confirming a plan of reorganization. (Petition for certiorari, pp. 15-16.)

But it is not true, however, that an order confirming a plan under section 77B carries with it a discharge of the debtor, as does an order confirming a composition. The statute governing compositions (11 U. S. C. sec. 30) provides as follows:

(b) An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

(d) The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

(e) Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered

in bankruptcy as herein provided. (July 1, 1898, c. 541, sec. 12, 30 Stat. 549; June 25, 1910, c. 412, sec. 5, 36 Stat. 839.)

Also 11 U. S. C. sec. 32 (c), as follows:—

> (c) The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge. (July 1, 1898, c. 541, sec. 14, 30 Stat. 550.)

Before the order confirming a composition is entered the debtor has done everything necessary to consummate the composition. There remains only the clerical task of distributing the consideration to the creditors. By contrast, the confirmation order under section 77B precedes the acts necessary to effect the reorganization;—lays out the program and directs what shall be done by the various parties. (See outline of confirmation order in this case pp. 14-16, particularly pars. 13, 15, 16, 20, 21, 22, 23, 24, 27, and 28.) Only after the debtor corporation has carried out its part of the reorganization program does it become entitled to a discharge, *viz.*—by subsequent final decree after the confirmation order has been fully executed and the reorganization completed. (Text of statute quoted at p. 17, *supra,* footnote.)

IV.

The appeal from the confirmation order was taken by Nettie Meyer alone; therefore the other six appellants who appear in this court cannot be heard to complain of the order dismissing said appeal.

Nettie Meyer alone prayed an appeal in the district court from the order of May 20, 1935, confirming the plan of reorganization. (R. 166.) She alone was granted such appeal, though "in her own behalf and for the use and benefit of the other objectors represented by Shulman,

Shulman & Abrams." (R. 168.) She alone filed an appeal bond. (R. 168; 96-97.)

Assuming that the other six objectors looked to Nettie Meyer to prosecute an appeal for their use and benefit, as well as her own, the appeal still remains that of Nettie Meyer, the only appellant of record. She alone could have abandoned the appeal at any stage; she alone may be heard to complain of the dismissal of her appeal by the circuit court of appeals.

On the other hand, what complaint can Nettie Meyer make of the order confirming the plan of reorganization? She made no objection to the plan and at no time joined in the objections made by Anna Jacobson, *et al.* (R. 141-143); nor in the "amendment" filed by Anna Jacobson, *et al.* (R. 144-145.)*

Nettie Meyer took no part in the proceedings after the entry of the order of March 20, 1935, from which she took her first appeal. It follows, we submit, that if Nettie Meyer had a right of appeal from the order of May 20, 1935, confirming the reorganization plan, she could urge on such appeal only the same objections to the jurisdiction of the court already presented in connection with the entry of the order from which she took her former appeal.

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*This proposed "amendment" was obviously not an amendment of the plan already submitted to the court, but the proposal of a fundamentally and completely different plan. Under the statute such different plan could be presented only upon prior approval of 25% of the class of creditors to which objectors belonged (holding claims not less than 10% in amount of all claims against the debtor). (Sec. 77B, sub-sec. (d); 11 U. S. C. sec. 207 (d).)

V.

The circuit court of appeals did not err in declining to exercise its discretionary power under section 24b of the bankruptcy act to grant Nettie Meyer leave to appeal from the order confirming the plan of reorganization.

As in the case of the appeal taken by leave of the district court, Nettie Meyer alone petitioned the circuit court of appeals to review the district court order of May 20, 1935. (R. 172-176.) In the affidavit attached to her petition—by her attorney, Mr. Meyer Abrams—appears the statement that he is attorney "for the other objectors who join her in said petition prepared by him." (R. 176.) This did not make the "other objectors"—not even named in the petition or affidavit unless as "*et al.*"—parties to the petition for review. (*Jackson* v. *Hosmer*, 14 Mich. 87.) Nor could the "other objectors" make themselves parties to the petition of Nettie Meyer—denied by the circuit court of appeals June 25, 1935 (R. 177-178)—by subsequent petition filed June 28, 1935 (R. 178-180), more than thirty days after the entry of the order of May 20, 1935.

* * * * * * *

Did the circuit court of appeals—exercising its discretionary power under section 24b of the bankruptcy act—err in refusing to grant Nettie Meyer a review from the district court order of May 20, 1935?

The attitude of the circuit court of appeals for the 7th circuit with respect to proceedings under section 77B and kindred sections of the bankruptcy act is forcibly expressed in its opinion, by Mr. Justice Evans, in the *Sterba* case, 74 F. (2d) 413, as follows (p. 416):*

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*The opinion, in a footnote, contains the following preliminary explanation:

"Section 74 was enacted March 3, 1933. It was passed as a relief

"This section (i.e., sec. 74) cannot meet with successful enforcement unless the court insists (a) that the plan of composition or the extension proposal be *promptly submitted,* and (b) that the plan or 'extension proposal' be carefully analyzed from the viewpoint of each secured creditor and that there be fairness to all as well as a justifiable basis for the hope of a realization of the plan.

The necessity for the prompt submission of the plan is apparent. It cannot be too strongly emphasized. This section was enacted because of the failure of receiverships to effectuate, and in many instances to attempt, reorganizations. In equity receiverships, on occasions, the jurisdiction of a court was invoked and a receiver appointed where the mortgage vastly exceeded the value of the property and there was no equity of redemption, and yet the receivership was continued for three, four and even five years with the expenses of the receivership consuming the entire revenue and leaving the bondholders in a worse position each year. The amendments to the bankruptcy act, above mentioned, were enacted to remedy the intolerable and seemingly hopeless condition that existed due to the inadequacy and abuse of the remedy which receivership proceedings afforded, as well as to a desire to help debtors who could not meet their obligations but who entertained a well-founded belief that they would ultimately pay their creditors in full from their properties, the values of which were so drastically reduced.

The amendments will, however, serve no useful purpose unless the court insists upon an early submission of the plan. The court should dismiss the proceedings and tax all costs to petitioner unless such plan is promptly forthcoming and it is deemed workable, un-

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measure and was intended to alleviate a desperate situation brought on by a sudden and extraordinary decline in values Section 75 was enacted at the same time and for the same reasons. It applies more particularly to farmers. Sections 76 and 77 apply to persons secondarily liable and to railroads. See 11 U. S. C. A. secs. 202, 203, 204, 205.

Sections 77A and 77B (11 U. S. C. A., secs. 206, 207) were enacted June 7, 1934, and were to perfect and make more effective the act of March 3, 1933, by extending its provisions to corporations generally and by expressly conferring wider jurisdiction upon federal courts."

less good cause is shown in unusual cases for an extension of time. * * *

Congress has seen fit to extend the jurisdiction of the district court and to extend the provisions of the bankruptcy act to estates of debtors who are insolvent but whose insolvency is traceable to abnormal conditions. This enlargement of jurisdiction, carrying duties in many instances administrative in character, must be assumed in the spirit in which it is delegated. It is not a case of the district court assuming a jurisdiction which may conflict with the jurisdiction of a state court that has appointed receivers. The United States district court has no alternative. The right is conferred upon a debtor to petition the United States district court for action, and the court must act. If petitioner acts in good faith and his plan is feasible, the court must further take action which will divest the jurisdiction of courts of equity, state or federal. (Then follows quotation from opinion in *Gross* v. *Irving Trust Co.*, 289 U. S. 342.)

* * * Again, it is not the United States district court which is assuming jurisdiction. It is a jurisdiction which it cannot avoid. It should, and must act unhesitatingly and in furtherance of the purpose of the act which conferred the jurisdiction. It is unfortunate that there may be clashes over jurisdiction or that animosities may develop between equity court receivers and counsel and trustees appointed under this section of the bankruptcy act. There is but one course open to the United States district court. All state and federal courts of equity must submit to and be bound by the lawful congressional action such as bankruptcy legislation.

Speaking of the plan which must be submitted for the court's and creditors' consideration it might be observed in passing that a plan is not a feasible nor a practicable one which ignores and conflicts with well considered and well matured plans ready for adoption in an equity receivership which are backed by the support of a substantial majority of the creditors.

* * * * * *

The proceedings under sections 74, 75, 76 and 77 are not the equivalents of equity receivership proceedings.

> They contemplate a feasible plan, *promptly presented*, whereby the overburdened debtor may, through creditors' cooperation (though unanimous creditor action is unnecessary) secure a scaling of debt or interest, or an extension of due date of debts. If none of these objects can be accomplished no good purpose can be attained by retaining jurisdiction of the proceedings. The case is then, one for liquidation through bankruptcy proceedings.
>
> And finally, we may add, success under this act will not be assured, unless the court recognizes that its duties are primarily administrative. It must act as the head of the administrative branch of an enterprise. It cannot sit idly by and act on plans submitted. It must originate, if necessary, and in many instances use all the forces at its command to bring about cooperation of conflicting interests. It may have to remove officers by it appointed if plans and recommendations are not presented within a reasonable time."

Appeals from orders in 77B proceedings, we submit, should be allowed only in harmony with the foregoing impressive declaration of policy. No doubt one of the principal reasons for the adoption of section 77B was to strip insincere dissentients of the power to frustrate reorganizations by strategic strike suits, interventions and appeals. This was one of the great difficulties of reorganization through equity receiverships, a difficulty that can be more effectively met by reorganization in bankruptcy, yet with ample power of both the district court and the appellate court to protect all interested parties against injustice. As well stated by Judge Wilkerson, in *Guaranty Trust Co.* v. *Chicago, M. & St. P. Ry. Co.*, 15 F. (2d) 419, at 441:

> "When it comes to turning over the property under a reorganization plan, courts will be vigilant to protect minorities against oppression and fraud. They will be equally vigilant to see that dissenting bondholders be not permitted to create a maneuvering value in their bonds."

The general policy of the bankruptcy law is to avoid delay of the proceedings by keeping appeals within the discretionary control of the reviewing court. To quote from the

opinion in *Broders* v. *Lage* (C.C.A.8), 25 F. (2d) 288, 290:

"It will be observed that section 24b provides for a review by appeal of all orders, both interlocutory and final, entered in proceedings in bankruptcy. The absolute right to prosecute such an appeal would open the door to innumerable appeals from summary orders entered in bankruptcy proceedings which might greatly impede the due and proper administration of the estates of bankrupts. We think congress sensed this danger, and for that reason wrote into the act the language 'by appeal * * * to be allowed in the discretion of the appellate court,' and thereby intended to provide that a party desiring to prosecute an appeal from such an order must make proper application to the appellate court for an order allowing such appeal, and that the appellate court upon the consideration of such application in the exercise of its discretion may either grant or deny the application. The authors of Collier on Bankruptcy, in the note to section 24, as amended, at page 159 of the 1927 supplement, say:

'The scope of this amendment, as explained by Senator Walsh who suggested it, is stated by him as follows:

'"It would be intolerable, however, to allow an appeal from every order which might be made in bankruptcy proceedings, and consequently the bill was modified so as to provide that except in the cases mentioned in section 25, the appellate court should exercise a discretion as to whether an appeal should be allowed or not. Accordingly, the plain meaning of the law as amended is that in the cases mentioned in section 25 the right to appeal is absolute, and no leave need be taken.' In all other cases, as prescribed in subdivision (b) of section 9 (24b of the bankruptcy act) the party desiring to have an order reviewed must go to the appellate court and ask leave to prosecute an appeal."'

* * * * * *

A plan of reorganization, by its nature, involves compromise and adjustment of the claims against the debtor and its property. The purpose of section 77B, manifestly, was not merely to transfer foreclosure suits from the state courts to the federal courts; not to extinguish the claims of

junior lienors, unsecured creditors and stockholders by giving them the equivalent of what they would get by a forced sale for cash in the present market, that is to say, nothing at all. The purpose is, rather, to bring about a reorganization which gives an equitable modicum of participation to the holders of junior claims who cooperate in the reorganization, a participation offsetting their rights of redemption, or as potential bidders at foreclosure sale, under state law.

In the present case the reorganization gives to the holders of $1,373,000 unsubordinated first mortgage bonds 90% of the securities of the reorganized corporation, and to the holders of $449,254.01 junior claims the remaining 10%. This court, in a case dealing with an equity reorganization, has already declared that the difference in participation between senior claimants and junior claimants may be manifested by a difference in amount of new securities of the same grade, as well as by allotment of different classes of securities. (*Kansas City Terminal Ry Co.* v. *Central Union Trust Co.*, 271 U. S. 445, 454, 70 L. ed. 1028, 1032.)

The fairness and feasibility of a plan of reorganization is essentially a question for the practical judgment of the trial court. It is quite evident from the record of this case that the judge of the district court who passed upon the plan of reorganization, the honorable John P. Barnes, did not passively accept the recommendations of the parties to the proceeding and their counsel, but gave the matter vigorous and informed personal judgment. (See memorandum of Judge Barnes *re* plan of reorganization, R. 161-165.) Note, especially, the underlying principles stressed by the court: (1) that a plan of reorganization, especially of a real estate corporation, should be as simple as possible; (2) that the relative rights and interests of all the parties should be decisively settled at the present time, "so that when it comes time to sell the property there will not be a controversy, as there certainly would be if it were

proposed to sell the property for enough to pay off class A certificates and nothing was to be left for class B or class C certificates." (R. 164.)

Regularity of the proceedings, plus the requisite statutory consents—in the present case almost unanimous—if not conclusive of the legality and equity of a plan of reorganization adopted under section 77B, are at least strongly persuasive that in approving the plan the trial court has not abused its discretion. *In re Pilsener Brewing Co.* (C. C. A. 9), 79 F. (2d) 63, 68; *In re New Rochelle Coal & Lumber Co.* (C. C. A. 2), 77 F. (2d) 881, 883; also other cases cited under point V-D, p. 26, *supra.*)

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For all of the reasons aforesaid, we urge that the circuit court of appeals did not err: (1) in dismissing the appeal in case no. 5941 (no. 375 of this court); (2) in dismissing the appeal in case no. 5531 (no. 376 of this court); in denying the petition of Nettie Meyer, under section 24b of the bankruptcy act, for review of the order of the district court confirming the plan of reorganization.

Respectfully submitted,

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